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June 24, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Hand Delivered
Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Room TW-A325
Washington, D.C. 20554

Re: CC Docket No. 99-198

Dear Secretary Salas:

Enclosed please find an original and seven (7) copies of the Reply Comments of Global NAPs South Inc. in the above-referenced proceeding.

Please return a filed-stamped copy of this letter to me in the enclosed stamped, self-addressed envelope.

Very truly yours,

Christopher W. Savage

cc: Attached Service List

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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of	
Petition of Global NAPs South, Inc. for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Dispute with Bell Atlantic-Virginia	CC Docket No. 99-198

REPLY COMMENTS OF GLOBAL NAPS SOUTH, INC.

Global NAPs South, Inc. ("Global NAPs") respectfully responds to the comments on its Petition in the above-referenced matter.

1. Comments Of The Virginia State Corporation Commission.

The Virginia State Corporation Commission ("SCC") claims that it fulfilled its responsibilities under the Act, but Global NAPs is unhappy with the substantive result.[1] With due respect, this is simply not an accurate description of the problem. Global NAPs sought an interconnection contract with Bell Atlantic under the terms of the Act beginning in July 1998. When negotiations failed, Global NAPs brought the dispute to the SCC for arbitration. Under Section 252 of the Act, by April 1999 Global NAPs should have had a decision setting out the terms of an interconnection agreement. That did not occur. Instead, the SCC told Global NAPs, in effect, to go away and start over with Bell Atlantic. There is no possible way to view such an action as determining the terms of an interconnection agreement in dispute between the parties. The SCC, therefore, did not do its job, and Global NAPs has a right to have this Commission do it instead.

[1] Comments of the Virginia State Corporation Commission ("SCC Comments") at 1-2.

The SCC tries to justify its inaction by focusing on the fact that this case involves Section 252(i) "opt in" rights. *See* SCC Comments, *passim*. But Section 252(i) opt-in issues are supposed to be decided faster and more efficiently than full-bore interconnection disputes.[2] Perversely, the SCC relied upon the procedural delays occasioned by the combination of Bell Atlantic's stonewalling and the SCC's failure to implement the requirement for an expedited procedure ***as essentially its sole ground for denying relief.*** For this reason, as described below, the SCC's decision represents a failure to fulfill its responsibilities under the Act whether the underlying situation is viewed as a failed negotiation or as a dispute over opt-in rights.

a. This Case Involves A Failed Negotiation, Not Simply A Section 252(i) Dispute.

Global NAPs explained in its arbitration petition that it originally sought to negotiate an individualized agreement with Bell Atlantic but that the effort to do so failed. It then demanded, ***as part of its negotiating strategy with Bell Atlantic,*** that it receive the "same" deal that Bell Atlantic gave to MFS. That request constituted a proposal in negotiations that the parties enter into an agreement that contains the same terms as the MFS Agreement, as Global NAPs understood those terms.

Bell Atlantic refused to accede to that demand. In so doing Bell Atlantic plainly violated Global NAPs' rights under Section 252(i). But it equally plainly violated its duties under Section 251(c). First, as far as Global NAPs can tell, there is nothing substantively unreasonable about the terms of the MFS Agreement; to the contrary, its terms seem to comport in all respects with the applicable substantive provisions of Sections 251 and 252. As a result, if Bell Atlantic wanted to refuse to provide any of them, it had an obligation (as part of its obligation to negotiate in good faith under Section 251(c)(1)) to provide some sort of substantive

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[2] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order,* 11 FCC Rcd 15499 (1986) ("*Local Competition Order*") at ¶ 1321.

explanation of why it would not do so.[3] Second, as Global NAPs explained in its original arbitration petition, irrespective of Section 252(i), Section 251(c) contains various nondiscrimination obligations which obliged Bell Atlantic to agree to a contract with Global NAPs that was equivalent to Bell Atlantic's contract with MFS. Third, various subsections of Section 251(c) incorporate by reference the "requirements" of Section 252, so the requirements of Section 252(i), whatever independent status they have, are ***also*** requirements of Section 251(c).

The SCC's decision ignored the actual, substantive disputes between the parties. There might indeed have been no need to reach these issues. That result would have obtained if the SCC had held that Global NAPs could simply opt into the MFS Agreement (and, in practical terms, fight later about the interpretation of the contract). But having decided (wrongly, in Global NAPs' view) that the agreement could not be "opted into," the question then became identifying which (if any) terms of the MFS Agreement — that is, which of the terms that Global NAPs had demanded — should or should not be included in the contract between Bell Atlantic and Global NAPs. That would have involved deciding the disputed issues of contract duration, compensation for ISP-bound calls, and the compensation rate applicable to those and other calls.

The SCC cannot and does not contend here that it actually resolved those disputes. It is therefore reduced to trying to convince this Commission that it did not have to.

At the outset, the SCC engages in some *post hoc* burden shifting, claiming that Global NAPs did not present adequate evidence for the SCC to establish interconnection terms and conditions that differ from those in the MFS Agreement. *See* SCC Comments at 2. This is wrong for two reasons. First, Global NAPs clearly indicated that it wanted to operate under the same terms as MFS, terms which had been approved by the SCC at the time the original agreement was submitted, and approved again in connection with subsequent agreements where

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[3] As laid out in Global NAPs' original arbitration petition, there were basically three "substantive" issues where the parties seemed to actually disagree. Those were (a) whether Bell Atlantic would compensate Global NAPs for calls to Internet Service Providers ("ISPs"); (b) whether any such compensation would take place at the rates specified in the MFS Agreement or at a lower rate; and (c) whether the agreement would have a three-year term (which MFS received, and Global NAPs requested) or would instead terminate on the same date as the MFS Agreement.

other CLECs had opted into the MFS Agreement.[4] Bell Atlantic's substantive objections to those terms were limited to the issues noted above. Both Global NAPs and Bell Atlantic presented argument on these points. There was therefore a record on which the decision could be made.

Second, any claim of lack of data is a red herring anyway. Congress fully anticipated that arbitration proceedings might have to be resolved on less-than-perfect records. For that reason, Section 252(b)(4)(B) specifically empowers state commissions to request any information from the parties that it wants, and if the information supplied turns out to be inadequate, to "proceed on the basis of the best information available to it from whatever source derived." One of the key purposes of that provision is to ensure that a CLEC facing a stonewalling ILEC will get a decision on the merits by the nine-month deadline no matter what the state of the record. Neither the ILEC nor, in cases such as this one, the state commission, may properly rely on "lack of information" as a basis for failing to make a decision.

The SCC also tries to blame Global NAPs for casting the case as solely relating to Section 252(i), or, as the SCC put it, "plac[ing] all of its eggs in the § 252(i) 'opt in' basket at the SCC." SCC Comments at 2. What really happened is that the SCC for whatever reason wanted to make this case go away and so chose to ignore Global NAPs' clear and repeated statements that this was ***not*** simply a Section 252(i) case, but instead directly involved negotiations under Section 251(c)(1) geared towards reaching an agreement that met the substantive terms of Sections 251 and 252. For example, both Global NAPs' arbitration petition, and its reply to Bell Atlantic's response to that petition (both attached to the SCC's Comments), show that Global NAPs viewed its request for the MFS Agreement as arising ***both*** under Section 252(i) ***and*** under Sections 251(b) and (c).

The SCC's reliance on the "issues matrix" submitted by the parties in advance of oral argument is also misplaced. *See* SCC Comments at 2-3. The "issues matrix" was not

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[4] For example, in Global NAPs' reply to Bell Atlantic before the SCC (attached to the SCC's comments as Exhibit 2), Global NAPs expressly notes that "the existing agreement has been approved by [the SCC] under Section 252(e)(2)(A) as both non-discriminatory and consistent with the public interest." *Id.* at 5.

represented as modifying or changing either parties' positions on the merits of any issue; it simply was intended (at least by Global NAPs) to summarize what seemed to be key issues for oral argument. Moreover, the "issues matrix" does not show what the SCC claims it does. Nowhere, for example, does Global NAPs agree or concede in that document (as the SCC now apparently wants to read it) that if it may not opt into the MFS Agreement, the case is over.[5]

Furthermore, it is disingenuous to claim that the SCC had any such understanding at the time the decision was rendered. During the oral argument in this case, Judge Moore specifically asked counsel for Global NAPs whether, if Global NAPs could not opt into the MFS Agreement under Section 252(i), the case would be done. Counsel for Global NAPs specifically disagreed with that conclusion, referring back to the discussion in the arbitration petition, briefly summarized above, indicating the link between Section 251(c) rights and Section 252(i) rights.[6] So even if the SCC sincerely misunderstood the state of the play based on the issues matrix — which was filed less than a week in advance of the oral argument — that short-lived misunderstanding was cleared up at the oral argument itself.[7]

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[5] To say that Global NAPs ***can*** "opt in" to the MFS Agreement (as indicated in the first issue on the matrix) is not to say that Section 251(c) is not also implicated. To the contrary, as indicated in the text of this pleading (and in the arbitration petition, and in Global NAPs' response to Bell Atlantic, and at the oral argument), Section 252(i) issues, as a matter of law, are also Section 251(c) issues. Moreover, the matrix indicates a difference of view between Bell Atlantic and Global NAPs on this point and others. *See, e.g.,* Issue 4, in which Bell Atlantic states that "[t]his case ***is*** an MFN case," while Global NAPs states that "[t]his case ***can be decided as*** an MFN case." And while Bell Atlantic said in issue 4 that the case "does not depend on the resolution of Internet compensation issues," Global NAPs stated that "***all of the disputed issues*** are matters which [the SCC] has authority to decide." So, while the SCC apparently accepted ***Bell Atlantic's*** view that it could make this case "go away" without actually establishing interconnection terms as between Bell Atlantic and Global NAPs, there is no legitimate basis to ascribe that view to Global NAPs.

[6] A copy of the relevant transcript pages is attached as Exhibit 1. Global NAPs received this copy by email, and the file received did not include page or line numbers. Line and page numbers were added to the file by Global NAPs.

[7] In this regard, in the SCC's filing, the (undated) issues matrix follows immediately behind a pleading filed by Global NAPs on December 30, 1998. This could give the erroneous impression that the issues matrix was filed at that early stage of the proceedings. In fact, the issues matrix was filed on March 19, 1999 — less than a week before the oral argument — as a result of the SCC's March 11, 1999 procedural order referred to in the SCC's Comments. *See* SCC Comments at 3. So, again, to the extent

(continued...)

For all these reasons, there can be no question that the three substantive disputes between the parties — contract term, compensation for ISP-bound calls, and compensation rate — were before the SCC for decision. In this regard, the SCC notes that Global NAPs asserted that, "[w]ith the exception of the four issues set out [in the petition,] GNAPs is aware of no other outstanding issues regarding interconnection."[8] Interestingly, the SCC does not claim either that (a) there were other issues in dispute regarding the contract or (b) that the SCC actually decided ***any*** of the disputed issues. Global NAPs submits that this silent concession by the SCC fully demonstrates the need for this Commission to assume jurisdiction over this dispute.

b. Violation of Section 252(i).

The discussion above shows that the SCC is simply wrong to claim that the case before it was nothing more than an opt-in case that could be dispensed with by simply declaring a particular contract unavailable for opting in. But even viewed as an opt-in case, Global NAPs is in its current awkward position — no interconnection agreement with Bell Atlantic after nearly a year of trying — by virtue of the SCC's failure to fulfill its obligations under the Act. So even from this perspective, this is still an appropriate case for action by this Commission.

In August 1996 this Commission made clear that Section 252(i) is intended to provide an expedited and efficient means by which competing local exchange carriers ("CLECs") such as Global NAPs may obtain interconnection with an incumbent LEC ("ILEC") such as Bell Atlantic.[9] The Commission directed state commissions to establish expedited procedures for resolving "opt in" disputes under Section 252(i) to ensure that these objectives were met.

7(...continued)
that there was any confusion on this point, it did not affect the conduct of the proceeding and was, in any event, fully corrected at the oral argument.

[8] *See* SCC Comments at 2. One of the four issues identified in the arbitration petition was, apparently, a misunderstanding that was cleared up by Bell Atlantic's response to that petition.

[9] *Local Competition Order* at ¶ 1321.

The SCC has never established any such procedures. To the contrary, as far as Global NAPs was (and is) aware, the only way to bring its dispute with Bell Atlantic before the SCC was by filing a petition for arbitration, which it did. Global NAPs requested expedited consideration of its petition, but that request was not granted.[10] Most significantly in the instant context, the lack of such an expedited procedure plainly contributed substantially to the SCC's (erroneous) conclusion that Global NAPs may not opt into the MFS Agreement.

Global NAPs sought to opt into the MFS Agreement (as part of its overall negotiations) in September 1998.[11] Bell Atlantic refused. If an expedited procedure for resolving Section 252(i) disputes had existed, then Global NAPs could have brought the dispute to the SCC in (say) October for resolution. Even under Bell Atlantic's view of the "term of the contract" dispute (*i.e.*, whether the contract is best viewed as having a three-year term or as terminating on the specific date of July 1, 1999), had there been an expedited procedure in place, Global NAPs would have been able to begin operating under the MFS Agreement by the end of 1998. Without such a procedure, however, the only applicable "deadline" was April 1999, based on the nine-month deadline for arbitration decisions in Section 252(b).

So even if the SCC was right in its conclusion that there was no point in allowing Global NAPs to opt into the MFS Agreement in April 1999 (when, under the "fixed termination date" theory, the contract had only three months to run), ***the only reason a decision was being rendered as late as April was the lack of an expedited procedure for resolving Section 252(i) disputes.*** The SCC has been seduced by Bell Atlantic's arguments into placing Global NAPs in a classic "Catch-22": the only reason that time had (supposedly) run out on Global NAPs' right to opt into the MFS Agreement was that Bell Atlantic had refused to honor that right, and Global NAPs was forced to ask the SCC to enforce it. In effect, therefore, the SCC is asserting that its

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[10] *See* Global NAPs Arbitration Petition (attached to SCC Comments), prayer for relief.

[11] Global NAPs originally stated that its opt-in request had been made in August 1998. In another proceeding, Bell Atlantic, upon reviewing its own records, concluded that the request had been made in September. Global NAPs will not dispute Bell Atlantic's view of the relevant date.

own failure to establish an expedited procedure for handing "opt in" disputes constitutes a basis for denying Global NAPs its "opt in" rights.[12]

* * * * *

Global NAPs does not understand why the SCC chose to ignore its responsibilities under the Act in the case of Global NAPs' dispute with Bell Atlantic. Whatever the reason, however, the SCC had a responsibility to resolve that dispute by establishing the terms and conditions of an interconnection agreement between the two parties. It plainly failed to do so. That responsibility, therefore, now falls on this Commission.[13]

2. Other Parties' Comments.

Ameritech uses this proceeding as yet another opportunity to ask for a general rule that any interconnection agreement that contains a specified termination date must, as a matter of law, be interpreted as embodying a fixed termination date, as opposed to a contract of a particular duration in years and months. Global NAPs has refuted this claim in detail in other

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[12] Global NAPs has noted elsewhere that Bell Atlantic's strategy seems to be to "run out the clock" on the MFS Agreement through the simple mechanism of refusing to allow Global NAPs to opt into it and then claiming that the passage of time — including, most prominently, time spent disputing the issues with Bell Atlantic — renders the MFS Agreement either too old or too near its stated expiration date to opt into. The only solution to this type of abuse is to require the termination date of the agreement to be adjusted outward to reflect the time that Global NAPs has been unable to operate under the agreement by virtue of Bell Atlantic's wrongful refusal to allow opting in.

[13] The SCC notes that it contemplated relinquishing jurisdiction to this Commission rather than deciding the case itself. *See* SCC Comments at 3-4. Global NAPs would have preferred for the SCC to actually decide the case, and so stated to the SCC. If Global NAPs had known that the SCC was in fact going to issue a "non-decision" of the sort it actually issued, then of course Global NAPs would have preferred to get the matter to this Commission sooner rather than later. But Global NAPs emphasizes again that it is not before this Commission because it is displeased with the substantive interconnection terms the SCC imposed. That would, indeed, in the normal case be a matter for appeal to federal district court under Section 252(e)(5). Global NAPs, however, has no interconnection terms about which to appeal. ***That*** is why Global NAPs is before this Commission — to ***obtain*** such terms and begin providing service in Virginia.

filings.[14] Suffice it to say here that some contracting parties may have intended a contract to terminate on a particular date, while others may have intended a contract to continue for a particular period of time from the date of its execution; which is true in any given case depends on the intentions of the parties. This question is not, therefore, susceptible to resolution by a general rule.

Cox Communications observes that Bell Atlantic's treatment of Global NAPs in this matter is part of a broader effort by Bell Atlantic and other ILECs to evade having to compensate CLECs for the work CLECs do in delivering calls from ILEC end users to ISPs served by the CLECs. Global NAPs, obviously, agrees with this assessment of Bell Atlantic's behavior, and, assuming that the Commission takes jurisdiction of this matter, expects to address that issue in appropriate submissions on the merits.

In a different vein, Connect! observes that Bell Atlantic has violated Global NAPs' Section 252(i) rights; it observes that the SCC has not, as required for by this Commission, established an expedited procedure for resolving Section 252(i) disputes; and it suggests that the Commission would do well to provide guidelines for states to establish such procedures, as well as an alternative forum if they do not. Global NAPs generally concurs in these comments. Indeed, as noted above, it is the SCC's failure to establish an expedited procedure that created the "Catch-22" in which Global NAPs finds itself: "You can't opt into the MFS Agreement in April 1999 because it has so little time left to run; it has so little time left to run because you had to fight Bell Atlantic to assert your opt in rights."[15]

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[14] A copy of Global NAPs' filing in response to Ameritech and others in CC Docket No. 99-154 (where Ameritech made similar arguments) is attached.

[15] In this regard, s noted above, faced with a similar problem, the Delaware Public Service Commission devised a simple solution. Even though it believed that the MFS Agreement normally terminated on July 1, 1999, the Delaware PSC directed that Global NAPs be permitted to operate under that contract for an additional six months precisely to compensate for the fact that Bell Atlantic's own illegal behavior in violating Section 252(i) was the cause of the "running of the clock" on that agreement. A copy of the relevant materials from Delaware is attached.

Finally, Bell Atlantic raises a hodge-podge of points, none of which have merit. First, it claims that the fact that the SCC issued an order means that this Commission cannot take jurisdiction of this case. *See* Bell Atlantic Response at 1-3. But Section 252(b) does not require the mere issuance of orders. It requires that open issues be resolved and terms and conditions of interconnection be established. An order that does not perform those functions does not meet the statutory requirements. Indeed, unlike cases of simple state commission inaction, which might be explained by delay, here the SCC order itself shows not only that the SCC has not performed its statutory responsibilities but also that it has no intention of doing so.

Second, Bell Atlantic continues its whining about the supposed injustice of having to pay Global NAPs for work that Global NAPs does when Bell Atlantic's customers originate calls that are bound for ISPs served by Global NAPs. Bell Atlantic Response, *passim*. Bell Atlantic wants to continue to charge its customers for carrying calls all the way to the ISPs, shed the cost of doing so itself, and then free-ride on Global NAPs' multi-million dollar investment in switching and related telecommunications equipment. The illogic and injustice of Bell Atlantic's position is quite clear.

Third, with remarkable chutzpa, Bell Atlantic claims that the SCC determined that Global NAPs' request to opt into the MFS Agreement "was made beyond a reasonable time within which a carrier should be permitted to opt into another carrier's agreement." Bell Atlantic Response at 3. The chutzpa arises because Bell Atlantic itself allowed ***other*** CLECs to opt into the MFS Agreement in Virginia ***after*** Global NAPs had requested to do so and ***after*** Bell Atlantic denied that request.[16] If there was any possible doubt that Bell Atlantic, in denying Global NAPs its Section 252(i) rights, was engaging in discriminatory behavior, this should eliminate that doubt. Indeed, Bell Atlantic's position borders on the Kafkaesque. It cannot reasonably claim that the MFS Agreement was "stale" at the time that Global NAPs asked to operate under it, because it has allowed other CLECs to opt into that agreement after it denied that right to Global NAPs. It can only claim, therefore, that it is too late ***now*** to allow Global NAPs to opt into it. But the only reason the issue is still in play now is Bell Atlantic's earlier refusal to abide by its

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[16] This issue was also raised at the oral argument in this matter. *See* attached transcript pages.

nondiscrimination obligations under Sections 251(c) and 252(i). It would be bizarre in the extreme for this Commission to accept this argument.

3. Conclusion.

The SCC had an obligation to establish the terms of an interconnection agreement between Global NAPs and Bell Atlantic. It failed to do so. It also had an obligation to resolve Section 252(i) "opt in" disputes in an expedited fashion. Not only did it fail to do so; when all the dust settled, it relied on delays occasioned by the lack of such an expedited mechanism to deny Global NAPs' right to opt into the MFS Agreement in the first place.

Global NAPs obviously thinks that it was right on the merits of its various disputes with Bell Atlantic, and that Bell Atlantic was wrong. But right or wrong, Global NAPs was entitled under the Act to a decision that established the terms and conditions under which it could interconnect with Bell Atlantic. That decision has not been, and manifestly will not be,

forthcoming from the SCC. This Commission, therefore, should accept jurisdiction of this dispute and resolve it on the merits in an expedited fashion.

Respectfully submitted,

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